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13 UNITED STATES DISTRICT COURT  
 14 CENTRAL DISTRICT OF CALIFORNIA  
 15 WESTERN DIVISION  
 16

17 TWENTIETH CENTURY FOX  
 TELEVISION, a division of  
 18 TWENTIETH CENTURY FOX  
 FILM CORPORATION, a Delaware  
 19 company, and FOX  
 BROADCASTING COMPANY, a  
 20 Delaware corporation,

21 Plaintiffs,

22 v.

23 EMPIRE DISTRIBUTION, INC., a  
 24 California corporation,

25 Defendant.

26 *AND RELATED COUNTERCLAIM.*  
 27  
 28

Case No. 2:15-cv-02158-PA-FFM

Hon. Percy Anderson

**DISCOVERY MATTER**  
 [BEFORE HON. FREDERICK F. MUMM]

**JOINT STIPULATION RE:  
 DEFENDANT EMPIRE  
 DISTRIBUTION, INC.'S MOTION TO  
 COMPEL PRODUCTION OF  
 DOCUMENTS**

Date: January 5, 2016

Time: 10:00 a.m.

Place: Courtroom 580

Discovery Cutoff: 1/25/16

Pretrial Conference: 3/4/16

Trial: 4/5/16

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1 **I. EMPIRE’S INTRODUCTORY STATEMENT**

2 Empire Distribution, Inc. (“Empire”) is a prominent record label and music  
3 distribution company that continuously since 2010 has released albums nationally  
4 and globally under the trademarks EMPIRE™, EMPIRE DISTRIBUTION™ and  
5 EMPIRE RECORDINGS™. Over those past five years, Empire has become one of  
6 the largest producers and distributors of hip hop, rap and R&B music in the  
7 country. It has had numerous Billboard charting releases from well-recognized  
8 artists under its EMPIRE label, including multiple platinum and gold records. The  
9 EMPIRE mark has been used in broad advertising and promotional campaigns both  
10 online and offline. It is a recognized symbol for quality music and music services  
11 and is well known among the relevant consuming public as identifying Empire’s  
12 goods and services.

13 Earlier this year, Twentieth Century Fox Television, a division of Twentieth  
14 Century Fox Film Corporation, and Fox Broadcasting Company (collectively  
15 “Fox”) created the EMPIRE television series (the “*EMPIRE SERIES*”) that portrays  
16 a hip hop, rap and R&B music record label, Empire Enterprises. It uses a virtually  
17 identical EMPIRE mark for the show and related music. Fox has publicly stated  
18 that the show is premised on individuals, entities and events from the real-world  
19 music industry. Fox’s Senior Vice-President of TV Music stated “[w]e want to  
20 **make the world of ‘Empire’ almost feel like a real music-breathing entity.**”  
21 Fox hired super producer Timothy “Timbaland” Mosley to craft the music for the  
22 series and has famous musicians appear as guest stars in each episode to perform  
23 music featured on the show including, for example, Ne-Yo, Gladys Knight, Estelle,  
24 Mary J. Blige, Snoop Dogg, Patti LaBelle, Jennifer Hudson, and Pitbull.

25 While Fox tries to justify its trademark infringement as a fictional  
26 “expressive work,” there is nothing fictional or expressive about Fox’s real world  
27 music production and distribution operations. Fox advertises, distributes and sells  
28 the music featured on the show under the EMPIRE banner (the “*EMPIRE SERIES*”

1 *MUSIC*”). Because the music shares the same search terms and genres as Empire’s  
 2 music, the albums and songs have been positioned in close proximity in physical  
 3 record stores and online stores such as iTunes, Google Play, Amazon.com, and  
 4 Spotify. Like other record labels, Fox and its affiliates enter into contracts with  
 5 musicians, produce and release music, and promote the artists and music at radio  
 6 stations, live performances, events, record stores and other venues. Fox, or its  
 7 affiliate Sony Music Entertainment, also has an online account with Mediabase, a  
 8 music industry service that monitors radio station airplay in the U.S. and Canadian  
 9 markets and provides in-depth analytical tools for radio/record industry  
 10 professionals.

11 Fox preemptively filed its Complaint for Declaratory Relief in this action  
 12 seeking to “protect its [alleged] intellectual property rights” in and to the Empire  
 13 series and music therefrom. (Complaint ¶¶ 1, 3.) Empire filed Counterclaims for  
 14 trademark infringement, unfair competition, and false advertising under federal and  
 15 state laws. This is a textbook case of trademark infringement, in that the parties’  
 16 EMPIRE marks are virtually identical, they sell the same products to the same  
 17 customers, and Empire began using its trademarks over five years before the  
 18 broadcast of Fox’s first television show.

19 Empire served its First Set of Requests for Production of Documents on Fox  
 20 (containing a total of 59 requests) on July 17, 2015 more than four months ago.  
 21 (Ex. A.) The discovery requests were designed to elicit information regarding  
 22 Fox’s conception and use of the EMPIRE mark, its creation and development of the  
 23 Empire television series and music produced in connection therewith, the litany of  
 24 products and services it has marketed and sold in connection with the EMPIRE  
 25 mark, and profits generated therefrom. Fox asserted a laundry list of boilerplate  
 26 general and specific objections to each request and refused to produce numerous  
 27 categories of documents that are highly relevant to Fox’s claims, Empire’s  
 28 counterclaims and the issues in this case. (Ex. B.) Fox also imposed arbitrary date

1 restrictions to further reduce the scope of its production of documents. For  
 2 example, Fox has refused to produce *any* documents created after the date that  
 3 Empire sent its first pre-suit cease and desist letter to Fox on February 16, 2015.  
 4 Fox's pre-litigation discovery cut-off date would arbitrarily exclude from  
 5 production numerous documents even if they are admittedly relevant to the claims,  
 6 issues, and damages to the case. In the intervening nine months since the demand  
 7 letter, Fox has embarked on Season 2 of the Empire series and widely expanded and  
 8 leveraged its Empire brand and infringement, including into multiple marketing,  
 9 sales, and musical opportunities and properties, which Fox would wrongfully  
 10 withhold from Empire and the trier of fact.

11 Empire sent its initial meet and confer letter to counsel for Fox on September  
 12 25, 2015. (Ex. C.) The parties participated in the initial Rule 37-1 Conference on  
 13 October 5, 2015 and, since that time, have had extensive meet and confer  
 14 discussions by phone and in writing. In an effort to compromise, in virtually every  
 15 instance, Empire agreed to significantly limit the scope of the requests. Despite  
 16 Empire's willingness to limit the scope of its requests, Fox still refuses to produce  
 17 documents responsive to many requests, based on unreasonable claims of  
 18 "relevance," "burden," or "privacy rights" despite the comprehensive Protective  
 19 Order Concerning Confidential Information issued by the Court in this case on  
 20 September 24, 2015. (Ex. D.)

21 The discovery deadline in this case is January 25, 2016 and trial is set for  
 22 April 5, 2016, but Empire has yet to receive a single document from Fox. A copy  
 23 of the Court's Scheduling Order issued July 23, 2015 is attached as Ex. E.

## 24 **II. FOX'S INTRODUCTORY STATEMENT**

25 This motion, like defendant's underlying claims, lacks merit. Both were  
 26 brought for one purpose only—to try to force a monetary "settlement" from Fox.  
 27 The motion should be denied for what it is, a premature and meritless attempt to  
 28 increase Fox's litigation expenses for settlement purposes.

1 Plaintiffs Twentieth Century Fox Television, a division of Twentieth Century  
2 Fox Film Corporation, and Fox Broadcasting Company (collectively, “Fox”)  
3 created, produce, and distribute the hit musical dramatic television series *Empire*.  
4 The show tells the fictional story of a feuding entertainment-industry family. After  
5 rapper and drug dealer turned music mogul Lucious Lyon is diagnosed with a fatal  
6 disease, viewers watch his ex-wife, Cookie, and their three sons fight for control  
7 over Lucious’ powerhouse music and entertainment company. This company is  
8 fittingly called Empire Enterprises, as it is a veritable—and fantastical—  
9 conglomerate based in New York City.

10 The show is a massive hit, garnering widespread attention, critical acclaim,  
11 and unprecedented ratings success. The original music featured on the show, which  
12 is produced by Grammy Award-winning producer Timothy “Timbaland” Mosley,  
13 has enjoyed similar success. Through Columbia Records, Fox releases songs  
14 following the broadcast of each new episode and also released an *Empire*  
15 compilation soundtrack (collectively, the “Soundtrack Music”). The album,  
16 *Empire: Original Soundtrack from Season 1*, debuted as the number-one album on  
17 the Billboard 200 chart for the week of March 28, 2015.

18 Fox commenced this action after defendant sought to leverage *Empire*’s  
19 success for its own financial gain, demanding that Fox pay it millions of dollars to  
20 continue to use the word “Empire.” Defendant’s motion repeatedly claims that the  
21 marks at issue are “virtually identical.” *See supra* at 1:16-17, 2:16. They are not  
22 *See* Dkt. 1 ¶¶ 17, 25.



26 In addition to lacking any factual basis, defendant’s claims are contrary to  
27 law. Fox’s use of the word “Empire” for the title of the show and the Soundtrack  
28



1 Music is fully protected by the First Amendment. Fox is susceptible to claims of  
 2 trademark infringement for these expressive works only if its use of “Empire”:  
 3 (1) has no artistic relevance to the underlying works; or (2) explicitly misleads  
 4 consumers as to the source of the works. *Mattel, Inc. v. MCA Records, Inc.*, 296  
 5 F.3d 894, 902 (9th Cir. 2002).<sup>1</sup> No amount of discovery can save defendant from  
 6 this defense. *See, e.g., Brown*, 724 F.3d 1235, 1247-48 (9th Cir. 2013).

7 Based on its meritless allegations, defendant brings this motion seeking to  
 8 impose, without justification, punitive discovery burdens on Fox. Underscoring its  
 9 true motives, defendant terminated the parties’ ongoing meet and confer discussions  
 10 without warning so that it could serve the instant stipulation the evening before the  
 11 court-ordered mediation. *Lens Dec.*, Ex. H, p. 165. Discovery motions should not  
 12 be served for strategic purposes or to try to extract settlement. Fox respectfully  
 13 requests that the motion be denied in full as premature.

14 Defendant reveals its efforts to manufacture controversy and impose punitive  
 15 burdens on Fox throughout its motion:

16 • Defendant claims that Fox is withholding “highly relevant”  
 17 documents, when the reality is that Fox has already agreed to produce all requested  
 18 documents with any conceivable relevance to the underlying dispute. In order to  
 19 meet its discovery obligations to these requests, Fox has had a team of 10 attorneys  
 20 reviewing documents full-time for the last two months, at significant expense. *Lens*  
 21

---

22 <sup>1</sup> As discussed in more detail below, to qualify for protection under the first prong,  
 23 the level of artistic relevance must only be “above zero.” *E.S.S. Entm’t 2000, Inc.*  
 24 *v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1100 (9th Cir. 2008). “Empire”  
 25 reverberates the show’s central themes as it is about a family living in New York  
 26 City, the “Empire State,” fighting—literally and figuratively—over an “Empire,”  
 27 namely their company, appropriately titled Empire Enterprises. With respect to the  
 28 second prong, use of the mark is not sufficient; rather, there must be some  
 affirmative statement of sponsorship or affiliation. *See Brown v. Elec. Arts, Inc.*,  
 724 F.3d 1235, 1245-48 (9th Cir. 2013). Far from making any explicit  
 misstatements, for obvious reasons, Fox consistently brands Empire as its own.



Dec. ¶ 14. Defendant now asks the Court to more than double this burden by producing irrelevant documents. For example, defendant asks the Court to order Fox to produce all of its creative and development files for the show, even though these documents—such as scripts—have nothing to do with the trademarks at issue.

- Defendant complains that it has received no documents from Fox but does not inform the Court that defendant too has not produced any documents. Nor does defendant reveal that Fox proposed—back on November 18—that the parties complete their productions on December 3 and that defendant took 12 days to respond to this proposal. Lens Dec., Ex. K, p. 188; Ex. J, p. 186.

- Defendant repeatedly mischaracterizes Fox’s position. Defendant claims, for instance, that “Fox has refused to produce *any* documents created after the date that Empire [Distribution] sent its first pre-suit cease and desist letter to Fox on February 16, 2015,” *supra* at 3:2-3. This is patently false. As defendant well knows, Fox has agreed to produce documents responsive to all requests through the date of the complaint as well as 12 categories of documents without regard to a cut off. Lens Dec., Ex. G, p. 157-58.

- Defendant asks this Court to undo all of the parties’ progress during their meet-and-confer efforts. As defendant admits, it has agreed to substantially narrow most of its requests. *See supra* at 3:14-15. Notwithstanding, defendant asks this Court to order Fox to produce documents responsive to its original requests—not the requests as narrowed through the meet-and-confer process. To the extent that the Court orders the production of any additional documents, which it should not, Fox respectfully requests that it does so with respect to narrowed requests.

### **III. ISSUES IN DISPUTE**

#### **A. Issue in Dispute No. 1**

##### **1. Empire’s Request for Production No. 1**

All DOCUMENTS reflecting, referring or relating to FOX’s creation and development of the *EMPIRE SERIES*, from the time the series was first conceived

1 through the date of the first pilot episode on January 7, 2015, including, without  
 2 limitation, any notes, drafts, memos, treatments, scripts, scriptments, synopsis,  
 3 outlines, pitches or COMMUNICATIONS relating to the concepts, themes, plots,  
 4 premises, topics and/or characters of the series.

## 5 **2. Fox's Response to Request for Production No. 1**

6 In addition to the foregoing General Objections, each of which is incorporated  
 7 herein by reference, Fox objects to this Request because it (a) is overly broad and  
 8 unduly burdensome in seeking all documents reflecting, referring, or relating to Fox's  
 9 creation and development of the *Empire* series, from the time the series was first  
 10 conceived through the date of the first pilot episode on January 7, 2015, without regard  
 11 to whether such documents are relevant to the issues in this action; (b) is vague and  
 12 ambiguous as to "the time the series was first conceived;" (c) seeks the production of  
 13 documents immune from discovery under the attorney-client privilege or work product  
 14 doctrine; and (d) seeks documents outside Fox's possession, custody, and control.  
 15 Subject to, and without waiving, the General Objections and these specific objections,  
 16 Fox will produce, based on a reasonable inquiry, responsive, non-privileged  
 17 documents that reflect, refer, or relate to the use of the mark "Empire" in connection  
 18 with Fox's creation and development of the *Empire* series from the time Fox learned  
 19 of the series that became *Empire* through January 7, 2015, if any such documents are  
 20 within Fox's possession, custody, or control.

## 21 **3. Empire's Contentions**

22 A party is entitled to obtain information and documents that are relevant to  
 23 any party's claim or defense or the "subject matter" of the case, which is broadly  
 24 interpreted to include any information that might reasonably assist a party in  
 25 evaluating the case, preparing for trial or facilitating settlement. FRCP 26(b)(1);  
 26 *Hickman v. Taylor*, 329 U.S. 495, 506-507 (1947) ("No longer can the time-honored  
 27 cry of 'fishing expedition' serve to preclude a party from inquiring into facts  
 28 underlying his opponent's case."); *Goodrich Corp. v. Emhart Indus.*, NO. EDCV

1 04-00759-VAP (SSx), 2005 U.S. Dist. LEXIS 25160, \*10-11 (C.D. Cal. Oct. 6,  
 2 2005) (“Relevance is broadly construed, and a request for discovery should be  
 3 considered relevant if there is any possibility that the information sought may be  
 4 relevant to the claim or defense of any party . . . A request for discovery should be  
 5 allowed unless it is clear that the information sought can have no possible bearing  
 6 on the claim or defense of any party.”).

7 Fox improperly limits its response to “documents that reflect, refer, or relate  
 8 to the use of the mark ‘Empire’” in connection with Fox’s creation and  
 9 development of the *EMPIRE SERIES* from the time of conception of the series that  
 10 became *Empire* through January 7, 2015. But Fox’s “use” of the mark ‘Empire’ is  
 11 not the only issue of relevance in this case. The request seeks information  
 12 regarding the origin of Fox’s *EMPIRE SERIES* including, but not limited to,  
 13 whether Fox intended to portray individuals, entities and events from the real-world  
 14 music industry (including but not limited to any individual, entity or event relating  
 15 to Empire), and whether Fox intended to use the *EMPIRE SERIES* to promote and  
 16 sell music in competition with other record labels including Empire. Moreover,  
 17 the parties’ respective claims and defenses in this trademark case have put at issue  
 18 thematic similarities between the *EMPIRE SERIES* or *EMPIRE SERIES MUSIC* on  
 19 the one hand and Empire on the other hand, overlap between the parties’ respective  
 20 businesses, overlap between the parties’ target markets, and overlap between the  
 21 *EMPIRE SERIES* characters, business themes, music, musical artists,  
 22 marketing/advertising channels, product line expansion, and distribution channels,  
 23 all of which are relevant to determining a likelihood of confusion.

24 In addition, Fox has injected the issue of a “First Amendment” defense to  
 25 trademark infringement and this request seeks documents relevant to issues  
 26 including, but not limited to, whether Fox’s use of the ‘Empire’ mark is commercial  
 27 and/or misleading.  
 28

1 Further, there has been no showing whatsoever by Fox that there is any  
 2 undue burden on Fox in producing the documents for this limited period of time  
 3 (presumably less than a year) from its own files. *See A. Farber and Partners, Inc.*  
 4 *v. Garber*, 234 F.R.D. 186, 188 (C.D. Cal. 2006) (“[G]eneral or boilerplate  
 5 objections such as ‘overly burdensome and harassing’ are improper — especially  
 6 when a party fails to submit any evidentiary declarations supporting such  
 7 objections.”); *Zuniga v. Western Apts.*, 2014 U.S. Dist. LEXIS 83135, 6-7 (D. Cal.  
 8 March 25, 2014) (overruling “unduly burdensome and oppressive” objection where  
 9 the objections were “conclusory and provide[ed] no information to support a  
 10 finding that provision of the requested discovery would unduly burden” the party  
 11 resisting discovery).

12 While Empire believes that Request No. 1 is appropriate as crafted, during the  
 13 meet and confer process Empire proposed significantly narrowing the scope of the  
 14 Request to include the following categories within the limited timeframe set forth in  
 15 the request: (1) the initial series of communications with Fox (both internal and  
 16 external) regarding the potential creation/development of the television show that  
 17 became “Empire”; (2) any treatments, synopses, outlines or other “pitch” materials  
 18 provided to Fox regarding the creation or development of the show from the  
 19 creators Lee Daniels or Danny Strong or the executive producers Brian Grazer  
 20 (Imagine Entertainment), Francie Calfo (Imagine Entertainment) or Ilene Chaiken  
 21 (Little Chicken Productions); (3) any communications/documents discussing the  
 22 fictional “Empire” record label and any potential relation to/inspiration from real  
 23 life individuals, artists, musicians, events, companies or record labels, or any intent  
 24 to portray a real life record label; (4) any communications/documents regarding the  
 25 use, production, or sale of music in connection with the Empire series (including  
 26 but not limited to the use of real musicians/artists/composers in connection with the  
 27 series); (5) all documents/communications relating to the origin/use of the name  
 28

1 “Empire” for the show; and (6) any communications/documents regarding the  
2 target audience/markets for the Empire series or music.

3 Unfortunately, Fox refused to produce documents responsive to the Request  
4 (even as narrowed) with the exception of certain documents responsive to  
5 subcategory 3, 4 and 5 above. Therefore, Empire had no choice but to seek relief  
6 from the Court. Fox should be compelled to produce all responsive documents  
7 without objection.

#### 8 **4. Fox’s Contentions**

9 Request No. 1 seeks all documents relating to the creation and development  
10 of the *Empire* television series, prior to the premiere of the show in January 2015.  
11 With this Request, defendant seeks all the scripts, treatments, outlines, drafts, notes,  
12 *etc.* that went into creating the television show, as well as all communications  
13 related thereto. Essentially, Request No. 1 seeks every scrap of paper about *Empire*  
14 prior to its premiere.

15 Defendant admits as much. Tellingly, defendant argues that the documents  
16 are relevant because they relate to the “subject matter” of the dispute. *See supra* at  
17 7:22-25. Put differently, defendant asks this Court to order the production of  
18 documents based on nothing more than the fact that they relate to the *Empire*  
19 television show. But a party cannot obtain discovery, much less the type of  
20 burdensome discovery at issue here, simply because it relates to the subject matter  
21 of the dispute; were the law otherwise, Fox could seek discovery of any document  
22 relating to defendant, full stop.

23 To support its argument, defendant quotes language that has been stricken  
24 from the text of Rule 26. *Id.* In fact, this language was deleted as a result of reports  
25 about litigants “seek[ing] to justify discovery requests that sweep far beyond the  
26 claims and defenses of the parties on the ground that they nevertheless have a  
27 bearing on the ‘subject matter’ involved in the action. *See* Advisory Committee  
28 Notes, 2000 Amendments. Notably, even while this repealed portion of Rule 26

1 remained in effect, a court could order discovery regarding the “subject matter” of  
 2 the dispute *only after a showing of good cause*, which defendant also fails to  
 3 mention.

4 The trademark allegations in this case cannot come close to supporting such a  
 5 grossly overbroad and incredibly burdensome request. Accordingly, Fox attempted  
 6 to work with defendant to narrow the scope of the request. At Fox’s request,  
 7 defendant narrowed its request to six categories of information. *See supra* at 9:12-  
 8 27.

9 As defendant reluctantly admits, but not until the penultimate sentence of its  
 10 argument section, Fox has agreed to produce documents responsive to many of the  
 11 requested categories (which stands in contrast to the opening sentence of paragraph  
 12 two of the section which, incorrectly, states that Fox has agreed to produce only  
 13 documents relating to the use of the “Empire” mark). *Compare supra* at 10:3-5  
 14 with 8:7-10. As detailed below, Fox has now agreed to produce any document  
 15 relating to the show’s creation and development with any conceivable relevance.

16 1. *“The Initial Series of Communications with Fox regarding the*  
 17 *potential creation/development of the television show that became Empire”*: As  
 18 Fox explained, and defendant never disputed, the “initial series” of communications  
 19 is too amorphous for a document request. *Lens Dec., Ex. G, p. 156*. More  
 20 fundamentally, defendant has never articulated why it contends such creative and  
 21 development materials are relevant. Nor could it, as Fox has already agreed to  
 22 produce, for example, any documents: (a) relating to the name of the show; (b)  
 23 relating to the use of “Empire” mark; (c) relating to the design of the mark; (d)  
 24 relating to the use of a skyline, if any; (e) relating to Fox’s alleged ambition to act  
 25 as a record label; (f) relating to the potential to derive revenue based on the sale of  
 26 music; (g) relating to defendant; (h) discussing the fictional company in the show  
 27 and any relation to/inspiration from real-life individuals, artists, musicians, events,  
 28 companies, or record labels; and (i) relating to any attempt to portray a real life



1 record label.<sup>2</sup> The balance of the creative and development documents are simply  
 2 not relevant, as evidenced by defendant's inability to identify any such documents  
 3 in response to Fox's repeated requests.<sup>3</sup>

4 2. "Any treatments, synopses, outlines or other pitch materials provided  
 5 to Fox regarding the creation or development of the show from creators Lee  
 6 Daniels or Danny strong or the executive producers Brian Grazer, Francie Calfo,  
 7 or Ilene Chaiken": As explained above, Fox has already agreed to produce any  
 8 such documents with any conceivable relevance to this dispute.

9 3. "Any communications/documents discussing the fictional "Empire"  
 10 record label and any potential relation to/inspiration from real life individuals,  
 11 artists, musicians, events, companies or record labels, or any intent to portray a  
 12 real life record label": This is moot as Fox has agreed to produce any responsive,  
 13 non-privileged documents. Lens Dec., Ex. G, p. 156.

14 4. "Any communications/documents regarding the use, production, or  
 15 sale of music in connection with the Empire series (including but not limited to the  
 16 use of real musicians/artists/composers in connection with the series)": Fox has  
 17 agreed to produce any responsive, non-privileged documents regarding the sale of  
 18 music in connection with the Empire series, and did so back on October 28. *Id.* As  
 19

---

20 <sup>2</sup> Fox will be serving amended responses to reflect the compromises reached during  
 21 the meet-and-confer process.

22 <sup>3</sup> Defendant's attempt to compel production of these documents based on Fox's use  
 23 of the First Amendment defense is misplaced. The Court need not look any further  
 24 than the show itself to determine whether the requirements of the First Amendment  
 25 defense apply: (1) whether Fox's use of the word "Empire" as a title has minimal  
 26 artistic relevance to the series, and (2) whether Fox misleads its consumers as to the  
 27 source of the series. *See Mattel*, 296 F.3d at 902. Fox's internal creative and  
 28 development documents have no place in this analysis, as evidenced by the fact that  
 courts routinely grant motions to dismiss on First Amendment grounds. *See Brown*,  
 724 F.3d at 1247-48; *VIRAG, S.R.L. v. Sony Computer Entm't Am. LLC*, 2015 WL  
 5000102, at \*12-13 (N.D. Cal. Aug. 21, 2015).



1 to the balance of the request, which seeks all communications and documents  
 2 relating to the use and production of music in the show, defendant has separate, and  
 3 more narrowly-tailored requests on this same subject. *See, e.g.*, Lens Dec., Ex. C,  
 4 Request Nos. 13, 15, 16 & 17. Defendant should not be permitted to undo the  
 5 compromises that the parties made through the backdoor of this omnibus request.

6 5. “All documents/communications relating to the origin/use of the name  
 7 “*Empire*” for the show”: Fox has already agreed to produce documents responsive  
 8 to this category and did so back on October 5, in response to Request No. 3. Lens  
 9 Dec., Ex. G, p. 156, 160.

10 6. “Any communications/documents regarding the target  
 11 audience/markets for the *Empire* series or music”: Fox has already agreed to  
 12 produce documents sufficient to show the actual audience of the show and  
 13 consumers of the soundtrack music. Accordingly, Fox asked defendant to explain  
 14 why it contended that it needed information about the target (*i.e.* intended)  
 15 audience/market, as opposed to the actual audience/market. *Id.* at 156. But  
 16 defendant never answered this question, much less informed Fox that it intended to  
 17 move to compel. Accordingly, this category should be denied.

18 The burden of requiring Fox to produce all of the underlying creative and  
 19 development materials for a primetime fictional drama cannot be overstated. An  
 20 inordinate amount of work goes into the creation and development of a television  
 21 show. The requested documents would constitute virtually the entire work product  
 22 of a team of individuals for the better part of a year. There is no basis to impose  
 23 such a burden on Fox. *See Epstein v. MCA, Inc.*, 54 F.3d 1422, 1423 (9th Cir.  
 24 1995) (“[T]he right of a party to obtain discovery is not unlimited.”); *Amini*  
 25 *Innovation Corp. v. McFerran Home Furnishings, Inc.*, 300 F.R.D. 406, 409 (C.D.  
 26 Cal. 2014) (“[T]he right to discovery, even plainly relevant discovery, is not  
 27 limitless.”)  
 28

1           **B.     Issue in Dispute No. 2**

2                   **1.     Empire’s Request for Production No. 2**

3           All COMMUNICATIONS between FOX and creators Lee Daniels or Danny  
4 Strong, or their agents/representatives, regarding the conception, creation or  
5 development of the *EMPIRE SERIES*, from the time the series was first conceived  
6 through the date of the first pilot episode on January 7, 2015.

7                   **2.     Fox’s Response to Request for Production No. 2**

8           In addition to the foregoing General Objections, each of which is incorporated  
9 herein by reference, Fox objects to this Request because it (a) is overly broad and  
10 unduly burdensome in seeking all communications between Fox and creators Lee  
11 Daniels or Danny Strong, or their agents/representatives, regarding the conception,  
12 creation, or development of the *Empire* series, from the time the series was first  
13 conceived through the date of the first pilot episode on January 7, 2015, without regard  
14 to whether such documents are relevant to the issues in this action; (b) is vague and  
15 ambiguous as to “the time the series was first conceived”; (c) seeks the production of  
16 information outside of Fox’s possession, custody, or control; (d) seeks information that  
17 violates the right of privacy of the talent with whom Fox works; and (e) is cumulative  
18 and duplicative of Request No. 1. Subject to, and without waiving, the General  
19 Objections and these specific objections, Fox will produce, based on a reasonable  
20 inquiry, responsive, non-privileged communications between Fox and creators Lee  
21 Daniels or Danny Strong, or their known agents/representatives, regarding the use of  
22 the mark “Empire” in connection with the conception, creation, or development of the  
23 *Empire* series, from the time Fox learned of the series that became *Empire* through  
24 January 7, 2015, if any such documents are within Fox’s possession, custody, or  
25 control.

### 3. Empire's Contentions

The issues with respect to Request No. 2 are similar to Request No. 1. Lee Daniels and Danny Strong created the *EMPIRE SERIES* and are executive producers involved in all aspects of the show.

Fox improperly limits its response to “documents that reflect, refer, or relate to the use of the mark ‘Empire’” in connection with Fox’s creation and development of the *EMPIRE SERIES* from the time of conception of the series that became *Empire* through January 7, 2015. Fox’s “use” of the mark ‘Empire’ is not the only issue of relevance in this case. The request seeks information regarding the origin of Fox’s *EMPIRE SERIES* including, but not limited to, whether Fox intended to portray individuals, entities and events from the real-world music industry (including but not limited to any individual, entity or event relating to Empire), and whether Fox intended to use the *EMPIRE SERIES* to promote and sell music in competition with other record labels including Empire. Moreover, the parties’ respective claims and defenses in this trademark case have put at issue thematic similarities between the *EMPIRE SERIES* or *EMPIRE SERIES MUSIC* on the one hand and Empire on the other hand, overlap between the parties’ respective businesses, overlap between the parties’ target markets, and overlap between the *EMPIRE SERIES* characters, business themes, music, musical artists, marketing/advertising channels, product line expansion, and distribution channels, all of which are relevant to determining a likelihood of confusion.

In addition, Fox has injected the issue of a “First Amendment” defense to trademark infringement and this request seeks documents relevant to issues including, but not limited to, whether Fox’s use of the ‘Empire’ mark is commercial and/or misleading.

Further, there has been no showing whatsoever by Fox that there is any undue burden on Fox in producing the documents for this limited period of time (presumably less than a year) from its own files. *See A. Farber and Partners, Inc.*

1 v. *Garber*, 234 F.R.D. 186, 188 (C.D. Cal. 2006) (“[G]eneral or boilerplate  
 2 objections such as ‘overly burdensome and harassing’ are improper — especially  
 3 when a party fails to submit any evidentiary declarations supporting such  
 4 objections.”); *Zuniga v. Western Apts.*, 2014 U.S. Dist. LEXIS 83135, 6-7 (D. Cal.  
 5 March 25, 2014) (overruling “unduly burdensome and oppressive” objection where  
 6 the objections were “conclusory and provide[ed] no information to support a  
 7 finding that provision of the requested discovery would unduly burden” the party  
 8 resisting discovery).

9 Fox’s objection based on “the right of privacy of the talent” is also improper  
 10 in light of the Protective Order Concerning Confidential Information issued by the  
 11 Court on September 24, 2015. *See Paulsen v. Case Corp.*, 168 F.R.D. 285, 289  
 12 (C.D. Cal. 1996) (finding no privilege for confidential information, and requiring  
 13 that if a corporation “believes that disclosure of this information might be harmful,  
 14 it must explain and support its objection...or seek a protective order under Rule  
 15 26(c), rather than refuse to produce the documents.”); *Franco-Gonzalez v. Holder*,  
 16 2013 U.S. Dist. LEXIS 186499 (C.D. Cal. 2013) (ordering production of  
 17 information withheld where “[t]he parties have entered into a protective order and  
 18 defendants have not argued that the protective order currently in place is inadequate  
 19 to protect the purported privacy rights of their employees”).

20 While Empire believes that Request No. 2 is appropriate as crafted, during the  
 21 meet and confer process Empire proposed significantly narrowing the scope of the  
 22 Request to include the following categories within the limited timeframe set forth in  
 23 the request: (1) the initial series of communications with Fox (both internal and  
 24 external) regarding the potential creation/development of the television show that  
 25 became “Empire”; (2) any treatments, synopses, outlines or other “pitch” materials  
 26 provided to Fox regarding the creation or development of the show from the  
 27 creators Lee Daniels or Danny Strong or the executive producers Brian Grazer  
 28 (Imagine Entertainment), Francie Calfo (Imagine Entertainment) or Ilene Chaiken

(Little Chicken Productions); (3) any communications/documents discussing the fictional “Empire” record label and any potential relation to/inspiration from real life individuals, artists, musicians, events, companies or record labels, or any intent to portray a real life record label; (4) any communications/documents regarding the use, production, or sale of music in connection with the Empire series (including but not limited to the use of real musicians/artists/composers in connection with the series); (5) all documents/communications relating to the origin/use of the name “Empire” for the show; and (6) any communications/documents regarding the target audience/markets for the Empire series or music.

Unfortunately, Fox refused to produce documents responsive to the Request (even as narrowed) with the exception of certain documents responsive to subcategory 3, 4 and 5 above. Therefore, Empire had no choice but to seek relief from the Court. Fox should be compelled to produce all responsive documents without objection.

#### **4. Fox’s Contentions**

Because defendant has “limited” this Request to cover the same six categories of information addressed above in response to Request No. 1, Fox refers the Court to its response above. *See supra* at Section III.A.4.

#### **C. Issue in Dispute No. 3**

##### **1. Empire’s Request for Production No. 8**

All DOCUMENTS reflecting, referring or relating to FOX’s alleged “intellectual property rights in and to the fictional television series *Empire* and the music therefrom, including copyright and trademark rights,” as alleged in paragraph 3 of the COMPLAINT.

##### **2. Fox’s Response to Request for Production No.8**

In addition to the foregoing General Objections, each of which is incorporated herein by reference, Fox objects to this Request because it (a) is overly broad and unduly burdensome in seeking all documents reflecting, referring, or

1 relating to Fox's alleged intellectual property rights in and to the fictional television  
 2 series *Empire* and the music therefrom, including copyright and trademark rights,  
 3 without regard to whether such documents are relevant to the issues in this action;  
 4 (b) seeks the production of documents immune from discovery under the attorney-  
 5 client privilege or work product doctrine; (c) seeks information otherwise available  
 6 to the public and the defendant; and (d) is argumentative. Fox will not produce  
 7 documents responsive to this Request.

### 8 **3. Empire's Contentions**

9 Fox has improperly refused to produce documents responsive to Request No.  
 10 8 that is narrowly tailored to specific documents that *Fox put at issue in this case*.  
 11 Paragraph 3 of Fox's Complaint states that Fox "owns the intellectual property  
 12 rights in and to the fictional series Empire and the music therefrom, including  
 13 copyright and trademark rights." (Complaint ¶1.) Indeed, Fox alleges that it  
 14 initiated this action to protect those purported rights. In paragraph 1 of its  
 15 Complaint, Fox alleges that "Fox brings this action to protect its intellectual  
 16 property rights in and to its breakout fictional television series *Empire*."  
 17 (Complaint ¶1.) This request simply asks Fox to produce documents reflecting,  
 18 referring or relating to its alleged intellectual property rights as alleged in its own  
 19 Complaint.

20 Since these are material allegations in Fox's Complaint, they are clearly  
 21 relevant and discoverable. FRCP 26(b)(1); *Hickman v. Taylor*, 329 U.S. 495, 506-  
 22 507 (1947); *Goodrich Corp. v. Emhart Indus.*, NO. EDCV 04-00759-VAP (SSx),  
 23 2005 U.S. Dist. LEXIS 25160, \*10-11 (C.D. Cal. Oct. 6, 2005). Further, there has  
 24 been no showing whatsoever by Fox that there is any undue burden on Fox in  
 25 producing the documents from its own files. Fox's objection based on "proprietary  
 26 or confidential business information" is also improper in light of the Court's  
 27 Protective Order Concerning Confidential Information issued by the Court on  
 28 September 24, 2015. *See Paulsen v. Case Corp.*, 168 F.R.D. 285, 289 (C.D. Cal.



1 1996) (finding no privilege for confidential information, and requiring that if a  
 2 corporation “believes that disclosure of this information might be harmful, it must  
 3 explain and support its objection...or seek a protective order under Rule 26(c),  
 4 rather than refuse to produce the documents.”); *Franco-Gonzalez v. Holder*, 2013  
 5 U.S. Dist. LEXIS 186499 (C.D. Cal. 2013) (ordering production of information  
 6 withheld where “[t]he parties have entered into a protective order and defendants  
 7 have not argued that the protective order currently in place is inadequate to protect  
 8 the purported privacy rights of their employees”).

9 While this request is narrowly tailored and proper by any standard, during the  
 10 meet and confer process, Empire proposed limiting the request to trademark rights  
 11 within the United States (as opposed to all intellectual property rights throughout  
 12 the world). However, Fox rejected even that compromise and would agree only to  
 13 produce documents “sufficient to show” Fox’s alleged trademark rights in the  
 14 United States. Fox’s arbitrary limitation to documents it deems “sufficient to  
 15 show” its trademark rights is unreasonable. Remarkably, Fox’s counsel asserted  
 16 that “Fox’s trademarks are not at issue in this case” despite the allegations in Fox’s  
 17 Complaint seeking to “protect its intellectual property rights in and to” the *EMPIRE*  
 18 *SERIES* and *EMPIRE SERIES MUSIC*.

19 Since Fox was unwilling to agree to Empire’s proposal during the meet and  
 20 confer process and required Empire to file this motion, Fox should be ordered to  
 21 produce all documents in its possession, custody or control responsive to the  
 22 request, as written, without objection.

#### 23 **4. Fox’s Contentions**

24 Request No. 8 seeks the production of every document relating to any of  
 25 Fox’s intellectual property rights in *Empire* and the Soundtrack Music, including,  
 26 for example, all trademark rights (not limited to the mark “Empire”) and  
 27 copyrights. The issue in this case, however, is whether Fox’s use of the word  
 28 “Empire” infringes on defendant’s purported trademark rights. It is thus



1 *defendant's* purported trademark rights that are at issue, not Fox's. And, of course,  
2 neither party's copyrights—or other intellectual property rights for that matter—are  
3 implicated. The motion should be denied as seeking irrelevant information.

4 Defendant's sole proffer of relevance is that Fox refers to its intellectual  
5 property rights in the Complaint. The language from Fox's Complaint is as  
6 follows: "Fox brings this action to protect its intellectual property rights in and to  
7 its breakout fictional television series *Empire*." Dkt. 1 at 2:6-7. Given the dispute  
8 between the parties, and defendant's demand that Fox rename its highly successful  
9 television show (or pay millions of dollars), this statement is far from remarkable.  
10 It does not somehow place all of Fox's intellectual property rights in *Empire* at  
11 issue. Indeed, defendant cites no authority for the sweeping proposition that a party  
12 must produce all documents relating to language plucked from a pleading,  
13 regardless of whether the requested documents are relevant to the underlying  
14 litigation. Rather, defendant's citations stand for nothing more than the basic  
15 proposition that relevant information is subject to discovery. *See Hickman*, 329  
16 U.S. at 506-07; *Goodrich Corp.*, 2005 U.S. Dist. LEXIS 25160, at \*10-11.

17 In an effort to avoid motion practice, Fox agreed to produce documents  
18 sufficient to support its statement that it has trademark rights in and to the mark  
19 *Empire*, even though these documents too are not relevant. Lens Dec., Ex. G, p.  
20 161. Defendant never articulated why it requires additional documents. Rather,  
21 defendant has simply repeated the refrain that Fox put such documents "at issue"  
22 through its Complaint.

23 Discovery has limits. *See supra* 13:23-27. Defendant's attempt to impose  
24 punitive discovery obligations on Fox on issues unrelated to the merits of the case  
25 is perhaps nowhere more clear than here.

**D. Issue in Dispute No. 4**

**1. Empire's Request for Production No. 14:**

All COMMUNICATIONS between FOX and the main cast members of the EMPIRE SERIES or their agents/representatives, including, but not limited to, Terrance Howard, Taraji Henson, Trai Byers, Jussie Smollett, Bryshere Gray, Kaitlin Doubleday, Grace Gealey and Malik Yoba, regarding the concept of the series prior to the date of the first pilot episode on January 7, 2015.

**2. Fox's Response to Request for Production No. 14**

In addition to the foregoing General Objections, each of which is incorporated herein by reference, Fox objects to this Request because it (a) is overly broad and unduly burdensome in seeking all communications between Fox and the main cast members of the *Empire* series, or their agents/representatives, regarding the concept of the series prior to January 7, 2015 without regard to whether such documents are relevant to the issues in this action; (b) is vague and ambiguous as to who the "main cast members" of the *Empire* series are; (c) seeks proprietary or confidential business information, trade secrets, or other highly sensitive information; (d) seeks the production of information outside of Fox's possession, custody, or control; and (e) seeks information that violates the right of privacy of the talent with whom Fox works. Subject to, and without waiving, the General Objections and these specific objections, Fox will produce, based on a reasonable inquiry, responsive, non-privileged communications between Fox and the main cast members of the *Empire* series, or their known agents/representatives, relating to the use of the mark "Empire" in connection with the *Empire* series, if any such communications are within Fox's possession, custody, or control.

**3. Empire's Contentions**

The issues with respect to Request No. 14 are similar to Request Nos. 1 and 2. Fox improperly limits its response to "documents that reflect, refer, or relate to the use of the mark 'Empire'" in connection with Fox's creation and development

1 of the *EMPIRE SERIES* from the time of conception of the series that became  
 2 *Empire* through January 7, 2015. Fox’s “use” of the mark ‘Empire’ is not the only  
 3 issue of relevance in this case. The request seeks information regarding the origin  
 4 of Fox’s *EMPIRE SERIES* including, but not limited to, whether Fox intended to  
 5 portray individuals, entities and events from the real-world music industry  
 6 (including but not limited to any individual, entity or event relating to Empire), and  
 7 whether Fox intended to use the *EMPIRE SERIES* to promote and sell music in  
 8 competition with other record labels including Empire. Moreover, the parties’  
 9 respective claims and defenses in this trademark case have put at issue thematic  
 10 similarities between the *EMPIRE SERIES* or *EMPIRE SERIES MUSIC* on the one  
 11 hand and Empire on the other hand, overlap between the parties’ respective  
 12 businesses, overlap between the parties’ target markets, and overlap between the  
 13 *EMPIRE SERIES* characters, business themes, music, musical artists,  
 14 marketing/advertising channels, product line expansion, and distribution channels,  
 15 all of which are relevant to determining a likelihood of confusion.

16 In addition, Fox has injected the issue of a “First Amendment” defense to  
 17 trademark infringement and this request seeks documents relevant to issues  
 18 including, but not limited to, whether Fox’s use of the ‘Empire’ mark is commercial  
 19 and/or misleading.

20 Further, there has been no showing whatsoever by Fox that there is any  
 21 undue burden on Fox in producing the documents for this limited period of time  
 22 (presumably less than a year) from its own files. *See A. Farber and Partners, Inc.*  
 23 *v. Garber*, 234 F.R.D. 186, 188 (C.D. Cal. 2006) (“[G]eneral or boilerplate  
 24 objections such as ‘overly burdensome and harassing’ are improper — especially  
 25 when a party fails to submit any evidentiary declarations supporting such  
 26 objections.”); *Zuniga v. Western Apts.*, 2014 U.S. Dist. LEXIS 83135, 6-7 (D. Cal.  
 27 March 25, 2014) (overruling “unduly burdensome and oppressive” objection where  
 28 the objections were “conclusory and provide[ed] no information to support a

1 finding that provision of the requested discovery would unduly burden” the party  
2 resisting discovery).

3 Fox’s objection based on “the right of privacy of the talent” is also improper  
4 in light of the Protective Order Concerning Confidential Information issued by the  
5 Court on September 24, 2015. *See Paulsen v. Case Corp.*, 168 F.R.D. 285, 289  
6 (C.D. Cal. 1996) (finding no privilege for confidential information, and requiring  
7 that if a corporation “believes that disclosure of this information might be harmful,  
8 it must explain and support its objection...or seek a protective order under Rule  
9 26(c), rather than refuse to produce the documents.”); *Franco-Gonzalez v. Holder*,  
10 2013 U.S. Dist. LEXIS 186499 (C.D. Cal. 2013) (ordering production of  
11 information withheld where “[t]he parties have entered into a protective order and  
12 defendants have not argued that the protective order currently in place is inadequate  
13 to protect the purported privacy rights of their employees”).

14 While Empire believes that Request No. 14 is appropriate as crafted, during  
15 the meet and confer process Empire proposed significantly narrowing the scope of  
16 the Request to include the following categories within the limited timeframe set  
17 forth in the request: (1) the initial series of communications with Fox (both internal  
18 and external) regarding the potential creation/development of the television show  
19 that became “Empire”; (2) any treatments, synopses, outlines or other “pitch”  
20 materials provided to Fox regarding the creation or development of the show from  
21 the creators Lee Daniels or Danny Strong or the executive producers Brian Grazer  
22 (Imagine Entertainment), Francie Calfo (Imagine Entertainment) or Ilene Chaiken  
23 (Little Chicken Productions); (3) any communications/documents discussing the  
24 fictional “Empire” record label and any potential relation to/inspiration from real  
25 life individuals, artists, musicians, events, companies or record labels, or any intent  
26 to portray a real life record label; (4) any communications/documents regarding the  
27 use, production, or sale of music in connection with the Empire series (including  
28 but not limited to the use of real musicians/artists/composers in connection with the

series); (5) all documents/communications relating to the origin/use of the name “Empire” for the show; and (6) any communications/documents regarding the target audience/markets for the Empire series or music.

Fox refused to produce documents responsive to the Request (even as narrowed) with the exception of certain documents responsive to subcategory 3, 4 and 5 above. Therefore, Empire had no choice but to seek relief from the Court. Fox should be compelled to produce all responsive documents without objection.

#### 4. Fox’s Contentions

Because defendant has “limited” this Request to cover the same six categories of information addressed above in response to Request Nos. 1 and 2, Fox refers the Court to its response above. *See supra* at Section III.A.4.

#### E. Issue in Dispute No. 5

##### 1. Empire’s Request for Production No. 18

All DOCUMENTS reflecting, referring or relating to FOX’s online account with Mediabase.

##### 2. Fox’s Response to Request for Production No. 18

In addition to the foregoing General Objections, each of which is incorporated herein by reference, Fox objects to this Request because it (a) is overly broad and unduly burdensome in seeking all documents reflecting, referring, or relating to Fox’s online account with Mediabase, without regard to whether such documents are relevant to the issues in this action; (b) is vague and ambiguous as to “Mediabase”; (c) seeks proprietary or confidential business information, trade secrets, or other highly sensitive information; (d) seeks the production of information outside of Fox’s possession, custody, or control; and (e) is argumentative. Fox will not produce documents responsive to this Request.

##### 3. Empire’s Contentions

Fox has improperly refused to produce any documents responsive to Request No. 18, which seeks documents reflecting, referring or relating to FOX’s online

1 account with Mediabase. Mediabase is an industry service that monitors radio  
2 station airplay in the U.S. and Canadian markets and provides in-depth analytical  
3 tools for radio/record industry professionals.

4 These documents are extremely relevant to the parties' claims (including  
5 damages) and defenses in this case for numerous reasons. The documents prepared  
6 by, sent to, or received from Mediabase are likely to evidence Fox's improper use  
7 of the "Empire" trademark in connection with the promotion, distribution and sale  
8 of the *EMPIRE SERIES MUSIC*. Further, the research data and analytical reports  
9 prepared by Mediabase will likely evidence the overlap between the parties'  
10 respective businesses, overlap between the parties' target markets, and overlap  
11 between the music, musical artists, marketing/advertising channels, product line  
12 expansion, and distribution channels, all of which are relevant to determining a  
13 likelihood of confusion. Further, information regarding the radio station airplay of  
14 the *EMPIRE SERIES MUSIC* is relevant both to the extent of infringement and the  
15 amount of damages. Moreover, as indicated above, one of Fox's primary themes in  
16 this case is that the *EMPIRE SERIES* is merely "fictional expressive work"  
17 purportedly protected by the First Amendment. The fact that Fox or its affiliate has  
18 an account with Mediabase, like other record labels, undermines Fox's theory of the  
19 case. Since Fox has injected the issue of a "First Amendment" defense to  
20 trademark infringement, this Request is even more relevant.

21 In its written response, Fox indicated that "Fox will not produce documents  
22 responsive to this Request." However, during the meet and confer process, Fox  
23 took a new and different position with regard to Request No. 18, claiming for the  
24 first time that it allegedly did not have any documents responsive to the request.  
25 Given Fox's new position, Empire's counsel sought repeatedly to clarify whether  
26 Fox was claiming to have no documents because: (1) a Mediabase account did not  
27 exist or (2) because the Mediabase account exists but was not technically opened in  
28 the name of Fox (i.e., the account was in the name of Sony Music that has been



1 retained by Fox to release the *EMPIRE SERIES MUSIC*). If the latter is true,  
 2 Empire contends that Fox should still have to produce the documents under the  
 3 definition of “FOX” which includes “affiliates and any other person or entity acting  
 4 on their behalf.” However, in each instance, Fox’s counsel refused to clarify its  
 5 position.

6 Since Fox’s counsel improperly refused to explain the basis of its position  
 7 during the meet and confer process, Empire had no choice but to file this motion.  
 8 To the extent a Mediabase account exists regarding the *EMPIRE SERIES MUSIC*  
 9 (whether specifically in the name of Fox or in the name of its affiliate Sony Music),  
 10 Fox should be compelled to produce all documents relating to that account in its  
 11 possession, custody or control.

#### 12 **4. Fox’s Contentions**

13 Defendant’s motion is moot and should be denied as such. Request No. 18  
 14 seeks documents “relating to Fox’s online account with Mediabase.” Because Fox  
 15 does not have an account with Mediabase, there are no documents to produce in  
 16 response to this Request. Reflecting this, Fox agreed to amend its response to  
 17 Request No. 18 to confirm this fact.<sup>4</sup> Lens Dec., Ex. G, p. 157. Moreover, without  
 18 defendant even requesting that Fox do so, Fox affirmatively offered to produce any  
 19 documents relating to Mediabase and *Empire* identified in its search for documents,  
 20 even though such documents would not be responsive to Request No. 18. *Id.* at  
 21 151. As Fox has already agreed to do more than the Request even demands,  
 22 defendant’s motion should be denied.<sup>5</sup>

23 \_\_\_\_\_  
 24 <sup>4</sup> Given the argumentative nature of the Request as phrased, *i.e.*, presuming that Fox  
 25 has an account with Mediabase when this is not true, Fox’s original response stated  
 that Fox would not produce documents responsive to this Request.

26 <sup>5</sup> There is no basis for defendant’s complaint that it “had no choice but to file this  
 27 motion” because Fox purportedly “refused to clarify the basis for its position.”  
 28 Defendant’s sole complaint is that Fox refused to answer the following question:  
 “Is it your position that there is no account/agreement with Mediabase relating to



Defendant's motion does not seek an order requiring Fox to comply with Request No. 18, which Fox has already agreed to do, but rather seeks to have this Court enforce an entirely different request. Defendant asks the Court to compel Fox to produce all documents relating to *any* Mediabase account regarding *Empire* series music regardless of whether the account is in Fox's name. *See supra* at 26:8-11. This is a different request than Request No. 18. Defendant is well aware of this—defendant served an additional request for production on November 12, 2015, one week before serving this motion, seeking the exact same documents defendant seeks here: "All DOCUMENTS in FOX's possession, custody, or control reflecting, referring or relating to accounts with Mediabase regardless of the entity that owns or controls the account." Lens Dec., Ex. E, Request No. 69. In accordance with the Federal Rule of Civil Procedure 34, Fox will respond to this new request by December 14, 2015. But this request is manifestly not currently before the Court.

## **F. Issue in Dispute No. 6**

### **1. Fox's General Objections**

In addition to Fox's specific responses and objections to each Request as provided below, Fox makes the following general objections to the Requests:

1. Fox objects to each and every Request, definition, and instruction that purports to impose obligations beyond those required or permitted by the Federal Rules of Civil Procedure or the Local Rules.

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the Empire series music, or whether there is an account/agreement with Mediabase relating to the Empire series music but in the name of an entity other than Fox (such as Sony Music)?" *See id.* at 151. (Tellingly, defendant's motion changes the phrasing of the actual question asked of Fox, presumably in an attempt to try to clarify the question.) But, as Fox explained, this question presumed something basic about the way Mediabase accounts work, namely that they are specific to an artist or album, which is incorrect. *Id.* After Fox explained this, defendant never responded much less indicated that it disagreed. Rather, a week and a half later, it moved to compel.

1           2.     Fox objects to each and every Request, definition, and instruction to the  
2 extent it contains inaccurate, incomplete, or misleading descriptions of the facts,  
3 persons, relationships, events, and pleadings underlying this action. The production of  
4 any information shall not constitute Fox's agreement with or acquiescence to any such  
5 description.

6           3.     Fox objects to each and every Request to the extent it seeks  
7 information that is neither relevant to any claim or defense in this action, nor  
8 reasonably calculated to lead to the discovery of admissible evidence.

9           4.     Fox objects to each and every Request to the extent it is vague,  
10 ambiguous, unclear, or fails to identify the requested documents with reasonable  
11 particularity as required by Federal Rule of Civil Procedure 34. To the extent that a  
12 Request requires subjective judgment on the part of Fox as to what information is  
13 requested, Fox will produce responsive, non-privileged documents according to its  
14 understanding of the Request.

15          5.     Fox objects to each and every Request to the extent it is overbroad,  
16 onerous, and unduly burdensome and, thus, outside the scope of permissible  
17 discovery.

18          6.     Fox objects to each and every Request to the extent it seeks information  
19 prior to the time Fox learned of the series that became *Empire* on the grounds that such  
20 requests are overbroad, beyond the scope of the allegations, and not reasonably  
21 calculated to lead to the discovery of admissible evidence. Fox further objects to each  
22 and every Request to the extent it seeks information after the time that defendant sent  
23 its initial objection to Fox in February 2014 on the ground that such requests are  
24 overbroad, beyond the scope of the allegations, seek information protected by the  
25 attorney-client privilege and work product doctrines and not reasonably calculated to  
26 lead to the discovery of admissible evidence. Fox will not produce documents outside  
27 of this relevant time period.  
28

1           7. Fox objects to each and every Request to the extent it seeks  
2 information that is a matter of public record, already in the possession of the  
3 defendant, or otherwise available to the public and the defendant.

4           8. Fox objects to each and every Request to the extent it seeks the  
5 disclosure of information that is more easily obtainable by deposition.

6           9. Fox objects to each and every Request to the extent it seeks cumulative  
7 or duplicative information.

8           10. Fox objects to each and every Request to the extent it seeks the  
9 production of documents other than in Fox's possession, custody, or control.

10           11. Fox objects to each and every Request to the extent it seeks the disclosure  
11 of information and/or production of documents protected by the attorney-client  
12 privilege, the attorney-work product doctrine, the common interest or joint defense  
13 privileges, rules and agreements governing privacy or confidentiality, or any other  
14 applicable privilege or protection recognized under statute or applicable case law.  
15 Inadvertent production by Fox of any information protected by any applicable  
16 privilege or protection shall not constitute a waiver of the privilege or protection.  
17 Fox objects to each and every Request to the extent it seeks Fox's sensitive,  
18 confidential, or proprietary business information. To the extent such documents are  
19 responsive, relevant, and not privileged, Fox will provide such documents after the  
20 Court enters an appropriate protective order in this case.

21           12. Fox objects to each and every Request to the extent it seeks  
22 information or the production of documents whose disclosure would otherwise be  
23 prohibited by applicable law, rule, regulation, or contract obligation.

24           13. Nothing contained in any response herein shall be deemed an  
25 admission, concession, or waiver by Fox as to the validity of any claim or defense  
26 asserted by Fox.

27           14. All objections as to the relevance, authenticity, or admissibility of any  
28 documents produced are expressly reserved by Fox.

15. To the extent that Fox responds to any of the Requests, it reserves the right to object on any grounds, at any time, to other discovery requests involving or relating to the subject matter of the Requests that Fox has responded to herein.

16. An objection or an undertaking to produce documents pursuant to a particular Request should not be construed to indicate that responsive documents actually exist.

17. Fox reserves all objections to the use of these responses. All such objections may be interposed by Fox at the time of trial or as otherwise required by the rules or order of the Court.

18. Fox objects to each and every Request to the extent it seeks the production of “all” documents in Fox’s possession. To the extent that Fox undertakes to produce documents, Fox will conduct a reasonable search of custodians reasonably likely to have non-cumulative, responsive documents as qualified by Fox’s objections and responses and, in the case of electronic documents, Fox will use search terms reasonably expected to yield responsive documents. Fox further objects to the production of “all” documents when a subset of the documents would be sufficient to show the pertinent information.

19. Fox objects to each and every Request to the extent it seeks the production of documents restored from backup tapes or archived data sources that are not reasonably accessible. Fox will not search backup tapes or archived data sources.

20. Fox objects to Instruction A as unduly burdensome. Fox will meet and confer with defendant about the timing for the production of documents, including whether productions should be done on a rolling basis.

21. Fox objects to Instruction B as overly broad and unduly burdensome to the extent that it purports to impose obligations beyond those required by the Federal Rules of Civil Procedure or Local Rules. Fox will meet and confer about a reciprocal protocol for the production of documents.

1           22. Fox objects to Instruction E as premature. Fox will meet and confer  
2 with defendant about a protocol for privilege logs.

3           23. Fox objects to the definition of “Fox” as overly broad and unduly  
4 burdensome to the extent that such definition purports to extend to Twentieth Century  
5 Fox Film Corporation as a whole. Fox will not produce documents from any division  
6 of Twentieth Century Fox Film Corporation other than Twentieth Century Fox  
7 Television. Fox further objects to the definition of “Fox” as overly broad and unduly  
8 burdensome to the extent it purports to include “principals, agents, representatives,  
9 attorneys, accountants, parents, subsidiaries, affiliates, and any other person or entity  
10 acting on” the behalf of Twentieth Century Fox Television or Fox Broadcasting  
11 Company.

12           24. Fox objects to the definition of “*Empire Series Music*” as overly broad,  
13 unduly burdensome, and not reasonably calculated to lead to the discovery of  
14 admissible evidence to the extent that it includes music other than the Soundtrack  
15 Music, as defined in the complaint.

16           25. Fox objects to the definition of “Documents” as overly broad and unduly  
17 burdensome to the extent such definition purports to have Fox search for documents or  
18 information neither relevant to the subject matter of this action nor reasonably  
19 calculated to lead to the discovery of admissible evidence. Fox further objects to the  
20 definition to the extent that it purports to require Fox to produce identical copies of  
21 documents.

22           26. Fox objects to each and every Request to the extent it is premature in  
23 asking or requiring Fox to provide information that is the subject of expert  
24 disclosures under Federal Rule of Civil Procedure 26(a)(2) according to the  
25 Scheduling Order filed by the Court on July 23, 2015 (Dkt. 23).

26           27. Fox reserves the right to redact or exclude information from  
27 documents to protect unnecessary disclosure of nonresponsive or irrelevant  
28 sensitive, confidential, or proprietary business information.

28. As used in each objection and response made herein, “and” or “or” shall be construed both conjunctively and disjunctively.

29. Fox reserves the right to supplement and/or amend these responses.

30. The fact that Fox may reassert particular objections in responding to a Request should not be construed in any way as limiting the generality of the foregoing objections. The General Objections set forth above are asserted with respect to each and every Request set forth below.

## 2. Empire’s Contentions

As demonstrated above, Fox has asserted numerous boilerplate General Objections to each and every request on virtually every conceivable ground. These General Objections severely limit the scope of Fox’s collection and production of documents, without specifically stating which documents or categories of documents are being withheld. Therefore, Empire has no way of knowing the nature, scope or quantity of relevant documents in Fox’s possession, custody or control that are being withheld from Fox’s production.

During the meet and confer process, Empire asked Fox to confirm that they would not be withholding any documents based on the General Objections (beyond what was stated in the specific responses to each individual request). However, quite the opposite, Fox confirmed that “to the extent our general objections relate to the scope of documents being produced, such as the relevant time period or geographic limitation to the United States, we are withholding documents based on our general objections.” (Notably, in contrast, Empire’s counsel confirmed that its general objections would not be used to limit the scope of its production beyond the specific responses to each request.)

These type of boilerplate General Objections are routinely rejected by courts. *See M2 Software, Inc. v. M2 Communs., L.L.C.*, 217 F.R.D. 499, 501 (C.D. Cal. 2003) (finding two pages of boilerplate “General Objections” were “not sufficient to raise any substantial, meaningful or enforceable objections to any particular

discovery request”); *A. Farber and Partners, Inc. v. Garber*, 234 F.R.D. 186, 188 (C.D. Cal. 2006) (faulting defendant for making “boilerplate objections to almost every single request for production, including broad relevancy objections, objections of ‘overly burdensome and harassing,’ ‘assumes facts not in evidence,’ privacy, and attorney-client privilege/work product protection”). Therefore, the Court should strike Fox’s General Objections in their entirety.

### 3. Fox’s Contentions

This is a false issue, and the result of apparent confusion by defendant. Had defendant indicated its intention to move on this issue, Fox would have been happy to resolve the apparent confusion. Rather than do so, defendant aborted the meet-and-confer efforts and filed this motion, refusing to even wait for Fox’s response to its email indicating its confusion for the first time. Lens Dec, Ex. H, p. 165. The motion should thus be rejected as premature.

In the event that the Court considers the merits of the request, it should similarly be denied. During the parties’ meet-and-confer discussions, Fox confirmed that it would not limit the scope of its production based on its general objections, with three exceptions: (1) General Objection No. 6 (Fox’s date range for its production); (2) General Objection No. 19 (Fox will be conducting a reasonable search for documents, utilizing custodians and search terms); and (3) General Objection No. 32 (Fox will be limiting its production to documents relating to the United States).<sup>6</sup> Lens Dec., Ex. G, p. 157. General Objection No. 6 is separately addressed in this joint stipulation. *See* Section III.G.2 *infra*. Defendant never

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<sup>6</sup> Fox inadvertently did not include this general objection in its initial responses. During the parties’ October 5 meet and confer, however, Fox informed defendant that its production would be limited to documents within the United States, given the territorial scope of the Lanham Act. Defendant agreed to this limitation, and Fox advised that it would be amending its objections accordingly. Lens Dec., Ex. G, p. 157.



1 objected to General Objection No. 19; nor could it, as Fox is manifestly required  
2 only to conduct a reasonable search for responsive documents. *See Reinsdorf v.*  
3 *Skechers U.S.A., Inc.*, 296 F.R.D. 604, 614-15 (C.D. Cal. 2013). And defendant  
4 agreed to General Objection No. 21 during the parties' October 5 meet and confer.  
5 Lens Dec., Ex. G, p. 163.

6 It is thus not true that "Empire [Distribution] has no way of knowing the  
7 nature, scope or quantity of relevant documents in Fox's possession, custody or  
8 control that are being withheld from Fox's production." Rather, Fox's response to  
9 each specific request delineates the scope of documents to be provided. For  
10 example, in response to Request No. 7, Fox has stated that it "will produce, based  
11 on a reasonable inquiry, responsive, non-privileged consumer or market research  
12 surveys conducted by Fox regarding the 'Empire' name, if any such documents are  
13 within Fox's possession, custody, or control." Lens Dec., Ex. D, p. 77-78. Fox will  
14 do just this, with the only limitations imposed by the General Objections being that  
15 Fox will produce only consumer or market research surveys predating the litigation  
16 and pertaining to the United States identified through a reasonable search. Fox's  
17 use of its General Objections is thus entirely appropriate.<sup>7</sup>

#### 18 **G. Issue in Dispute No. 7**

#### 19 **Fox's Cut-Off Date for Collection/Production of Documents**

#### 20 **1. Empire's Contentions**

21 Fox has refused to produce *any* documents created after the date that Empire  
22 sent its first pre-suit demand letter to Fox on February 16, 2015. Fox's pre-  
23 litigation discovery cut-off date would arbitrarily exclude from production  
24 numerous documents even if they are admittedly relevant to the claims, issues, and  
25

26 <sup>7</sup> The cases that defendant cites about general objections are inapposite as Fox is not  
27 withholding documents based on boilerplate objections as to overbreadth, burden,  
28 or relevancy. *See M2 Software*, 217 F.R.D. at 501; *A. Farber & Partners*, 234  
F.R.D. at 188.

1 damages to the case. In the intervening nine months since the demand letter, Fox  
 2 has embarked on Season 2 of the Empire series and widely expanded and leveraged  
 3 its Empire brand and infringement, including into multiple marketing, sales, and  
 4 musical opportunities and properties, which Fox would wrongfully withhold from  
 5 Empire and the trier of fact.

6 During the meet and confer process, Fox proposed a new cutoff date of the  
 7 date it filed its Complaint on March 23, 2015 with a number of specific exceptions  
 8 through the date of collection including:

- 9 • Exemplars of advertisements, promotions, or marketing efforts using the  
 10 “Empire” logo
- 11 • Executed agreements between Fox and anyone else primarily or solely  
 12 relating to the use of the “Empire” mark/logo
- 13 • Documents sufficient to identify goods or services offered or sold in  
 14 connection with the “Empire” mark
- 15 • Documents sufficient to show the channels of trade or distribution through  
 16 which Fox has sold or offered for sale or currently sells any goods or services  
 17 identified by the “Empire” mark
- 18 • Documents sufficient to show geographical areas in which Fox has sold or  
 19 offered for sale goods or services under the “Empire” mark
- 20 • Documents sufficient to show Fox’s revenues, expenses, and profits relating  
 21 to goods and services sold or offered for sale with the “Empire” mark
- 22 • Documents sufficient to show the total volume of sales for all goods and  
 23 services sold with the “Empire” mark
- 24 • Documents sufficient to show the amount spent by Fox each year to  
 25 advertise, market, and promote goods and services with the “Empire” mark
- 26 • Documents sufficient to identify each entity or individual authorized to sell,  
 27 distribute, promote, advertise, or market any goods or services identified by  
 28 Fox’s “Empire” mark

- 1 • Documents relating to any instance in which any person or entity made any
- 2 statement, comment, inquiry, or question regarding any actual or potential
- 3 association, affiliation, connection, correlation, relation, or sponsorship
- 4 between the Empire series and/or Empire series music, on the one hand, and
- 5 Empire Distribution, on the other hand
- 6 • Communications by or from Fox, Fox's customers or other persons,
- 7 expressing any actual or potential confusion, association, affiliation,
- 8 connection, correlation, relation, or sponsorship, or lack thereof, between Fox
- 9 and Empire Distribution and their respective goods or services
- 10 • Documents Fox is required to produce under Rule 26 and the Court's
- 11 Scheduling Order.

12 However, Empire contends that Fox's proposal (with all the various  
13 permutations) is overly complicated to execute, enforce and verify, and it would  
14 arbitrarily exclude documents from production even if they are admittedly relevant  
15 to the claims, issues and damages in the case. Empire maintains that the governing  
16 standard should be "relevance" to the subject matter of the case rather than an  
17 arbitrary date, and extend at least through the date of Fox's collection. *See* FRCP  
18 26(b)(1); *Hickman v. Taylor*, 329 U.S. 495, 506-507 (1947); *Goodrich Corp. v.*  
19 *Emhart Indus.*, NO. EDCV 04-00759-VAP (SSx), 2005 U.S. Dist. LEXIS 25160,  
20 \*10-11 (C.D. Cal. Oct. 6, 2005). The Court should compel Fox to collect and  
21 produce documents at least through the date of its collection while reserving the  
22 right of Empire to seek later documents if appropriate or necessary.

## 23 2. Fox's Contentions

24 As is routine, Fox has indicated that it will use the date of the complaint as a  
25 cutoff for producing documents generally, with the exception of any documents that  
26 defendant identifies that it needs past this date (and for which Fox agrees). Fox did  
27 so in an effort to reduce the immense burden that it faces in response to defendant's  
28 document requests. As it stands, in response to the documents it has already agreed

1 to provide, Fox has had a team of 10 contract attorneys working full time to review  
2 documents for the past two months, at considerable expense. Lens Dec. ¶ 14. If  
3 Fox were to agree to defendant's request to include documents responsive through  
4 collection, the number of documents—and attendant time and expense—would  
5 double, at a minimum. *Id.*

6 Because of this crippling burden, Fox cannot agree to defendant's proposal  
7 that documents be produced through the date of collection. That said, Fox has  
8 repeatedly told defendant that it is amenable to producing specific categories of  
9 documents after the date of the complaint, provided that defendant explains why it  
10 requires such documents. Defendant, however, has refused to do so. Lens Dec.,  
11 Ex. G, p. 158; Ex. H, p. 166.

12 Notwithstanding defendant's refusal to attempt to reach a compromise,  
13 Fox—on its own initiative—identified 12 categories of documents that it would  
14 produce through the date of collection. Lens Dec., Ex. G, p. 157. These categories  
15 address Fox's advertisements using the "Empire" logo; agreements concerning the  
16 use of the "Empire" logo; goods or services sold in connection with the "Empire"  
17 mark, including channels of distribution and geographical areas in which such  
18 goods are sold and entities authorized to sell such goods; revenue and sales figures;  
19 instances of confusion; and expert materials. Even further still, Fox offered to  
20 consider any additional categories identified by defendant. *Id.* at 158.

21 Defendant rejected Fox's proposal based on nothing more than the statement  
22 that it was "overly complicated." Lens Dec., Ex. H, p. 166. Hundreds of thousands  
23 of dollars cannot be imposed on a party simply because one's adversary finds the  
24 proposal "complicated." Not to mention, Fox, as the producing party, is charged  
25 with ensuring that the proposal is executed. Because defendant has not identified  
26 any documents that it requires beyond those Fox has already agreed to provide, and  
27 because defendant's proposal would impose hundreds of thousands of dollars of  
28 legal expenses on Fox, its motion should be denied.

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1  
2 Dated: December 3, 2015

Respectfully submitted,  
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3  
4 By: /s/ Peter N. Villar

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6 Attorneys for Defendant and  
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8 *Pursuant to L.R. 5-4.3.4, Petter N.*  
9 *Villar hereby attests that all other*  
10 *signatories listed, and on whose behalf*  
11 *the filing is submitted, concur in the*  
12 *filing's content and have authorized the*  
13 *filing.*

14 Dated: December 2, 2015

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15 By: /s/ Molly M. Lens

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